TESTIMONY

OF

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INS GENERAL COUNSEL

BEFORE THE

COMMITTEE ON THE JUDICIARY

OF THE U.S.HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 2121, THE "SECRET EVIDENCE REPEAL ACT"

May 23, 2000

I am pleased to have the opportunity to discuss with you, on behalf of the Department of Justice, H.R. 2121, and more specifically, the use of classified information in immigration proceedings.

At the outset, I want to emphasize that the INS understands and acknowledges the serious concerns about the *ex parte, in camera* use of classified information in immigration proceedings. We take these matters seriously, and we do not casually resort to the use of classified information. The INS prosecutes and the Executive Office for Immigration Review hears nearly 300,000 cases each year. There are currently 11 pending cases involving classified information.

As Members of this Committee know, the Department's pending matter policy, as well as its rules regarding the individual privacy of aliens, substantially constrain my ability to discuss individual immigration cases. Nor can the Department discuss sensitive national security information that is classified.

Having noted the constraints that govern my appearance today, I do want to address the policies and procedures that are at issue in the INS's use of classified evidence and that serve as the focus of this hearing this morning. I will try to illustrate the value to the United States of preserving the ability to use classified information in *ex parte, in camera* immigration proceedings.

Role of the Department of Justice

The Attorney General also recognizes the serious concerns implicated by this issue. As a result, she has instituted practices and procedures to ensure that classified evidence is used only when necessary to adequately serve the national interest. Before any final decision is made to use classified information in immigration proceedings, the information is subjected to rigorous review at high levels of all affected Justice Department components to ensure that it is necessary and appropriate to use the information.

Either the Attorney General or the Deputy Attorney General must currently approve any use of classified information in immigration proceedings. The aim of this review is to ensure that classified evidence is used only when it is necessary, and when it cannot be declassified.

Hypothetical Example

The issue of using classified information implicates two very important objectives that the Department of Justice strives to achieve: (1) adjudicating immigration claims in a manner that is as transparent and fair as possible; and (2) protecting the national security and the safety of all Americans.

There is a tension between these two goals in classified evidence cases. To make the problem more concrete, consider the following hypothetical example. Assume that the INS encounters an alien who has been in this country illegally for several years. The alien concedes that he is here illegally and that he is deportable. But then he asks the immigration judge to exercise discretion and to grant him asylum so he will not be returned home. The law says that an alien who is a threat to the national security cannot be granted asylum. The law also says that someone who is granted asylum can seek adjustment of status to become a permanent resident after one year. Now, suppose that the INS receives classified information that this alien is actually a dangerous person – perhaps an activist in a terrorist organization. And suppose that the classified information comes from a very reliable source, such as an official of that organization. And, suppose that we cannot reveal that information publicly without thereby revealing the source and compromising the entire intelligence-gathering operation.

Here is the dilemma. To protect the national security, the immigration judge must be allowed to see the classified information before she decides whether the alien should be given asylum. But neither the INS nor the immigration judge can show the information to the alien without risking the national security.

The INS believes that the judge should be allowed to see the evidence. That is what the law now says, that what the Supreme Court and most federal courts have said is constitutionally permissible, and that is what is appropriate to protect the national security.

H.R. 2121

I describe the various provisions of H.R. 2121 in my written testimony, so I will not go into great detail here. In essence, the bill would repeal most of the INS's statutory authority to present classified information *in camera* and *ex parte* in any type of removal proceeding.

Relevant Immigration Law

The INS is charged with the difficult task of determining when to admit an alien to the United States, when to grant an alien's application for an immigration benefit, and when to place an alien in removal proceedings. The INS undertakes these tasks with vigilance in an effort to ensure the protection of our national security.

Congress has considered this issue in the past and, for good reason, has authorized the Attorney General to use and consider classified information in *ex parte, in camera* proceedings. The Attorney General has delegated much of her authority under the immigration laws to the INS.

Congress has authorized the Attorney General to consider classified evidence in several provisions of the Immigration Nationality Act (Act).

First, Section 105 of the Act authorizes the INS to maintain direct and continuous liaison with the federal intelligence and law enforcement entities for the purpose of enforcing the immigration laws in the interest of the internal security of the United States.

Second, there is a special expedited removal proceeding for security-related cases. Section 235(c) specifically allows for the consideration of "confidential" if an immigration officer or immigration judge "suspects that an arriving alien may be inadmissible" under INA §212(a)(3)(A) (other than clause (ii)), (B), or (C). Under the regulations, the INS has limited the use of this provision to "arriving aliens." My written testimony describes the process but I would note that Section 235(c) has been part of the immigration law since 1952.

The third way in which the INS uses classified information is in conventional removal proceedings under Section 240 of the Act. If an alien is removable from the U.S. on a charge based on unclassified evidence, such as overstaying a visa, but the alien applies for discretionary relief from removal, the INS may introduce classified national security information to oppose the application for relief. Discretionary applications for relief from removal include asylum, cancellation of removal, suspension, or adjustment of status. The INS presents classified information to oppose applications only when other agencies have provided substantive, credible, and relevant classified information which indicates that the alien is ineligible for such relief or does not merit the exercise of discretion.

This express statutory authority was added to the law as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. However, it is important to note that in 1996, Congress simply sanctioned by statute an authority to introduce classified evidence that had been a part of the Attorney General's regulations since at least 1961. Furthermore, the Supreme Court and other federal courts have upheld these regulations and this practice over the last four decades.

The fourth way that the Attorney General may use classified information is in immigration proceedings before the Alien Terrorist Removal Court (ATRC). The Antiterrorism and Effective Death Penalty Act of 1996 added this provision to the law. Under the ATRC, the Attorney General must certify that conventional removal proceedings would pose a risk to the national security.

Removal Proceedings

An alien in conventional removal proceedings has certain statutory rights. The alien has the right: to be represented by an attorney at no expense to the government; to notice of whether the alien will be maintained in custody and, in some cases, to seek a bond redetermination hearing before an immigration judge; to a reasonable opportunity to examine the unclassified evidence against the alien; to present evidence on the alien's behalf; to cross examine witnesses presented by the INS; and to a complete record of the proceeding. However, Section 240(b)(4)(B) specifically states that "these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this Act."

The Supreme Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application for admission because the power to admit or exclude aliens is a sovereign prerogative. The Court, however, has held that once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.

Based on this distinction, the burden of proof in a conventional removal proceeding depends on the type of charge. An applicant for admission bears the burden of proving that he or she is "clearly and beyond a doubt entitled to be admitted and is not inadmissible" to the United States or by clear and convincing evidence that the alien is lawfully present in the U.S. pursuant to prior admission. If the alien has been admitted to the United States, then the INS bears the burden of establishing by clear and convincing evidence that the alien is deportable.

It should also be remembered that immigration proceedings are administrative and not criminal proceedings. As the Supreme Court has noted, the purpose of immigration proceedings is to "provide a streamlined determination of eligibility to remain in this

country, nothing more." *United States v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). Thus, the full range of rights guaranteed a criminal defendant, including the Sixth Amendment's right to confrontation of witnesses, are not applicable in immigration proceedings. Recognizing the interests involved, and the rights and duties of all parties, courts, including the United States Supreme Court, have concluded that INS use of classified information in *ex parte, in camera* proceedings to deny discretionary relief from deportation or to deny release on bond is appropriate.

Process for Using Classified Information

The INS learns that classified information relating to an alien may exist in two ways: from another agency or from the alien. In some cases, the INS requests that other agencies search their records to determine whether any information exists on the alien. In these cases, the INS usually has some indication that the alien may be involved in terrorist activity or human rights abuses. In other cases, the other agency contacts the INS to report that it possesses relevant information.

In still other cases, an alien may claim an affiliation with a United States agency. This claim is usually made in the asylum context. When such a claim is made, the INS goes to the specified agency and requests that the agency check its records and report whether it has any information on the alien.

In each of these scenarios, most, if not all, of the information is classified. I will leave it to Mr. Parkinson to explain the requirements under the relevant Executive Orders for classification of documents. However, I want to emphasize that the INS does not make the classification decision.

The decision to submit classified evidence is made on a case-by-case basis without regard to a person's religion, nationality or ethnic origin. The INS and the Department of Justice have developed standard procedures for dealing with each case that involves the potential use of classified information. In such cases the FBI, or whatever other agency has the information, shares it with the INS. The INS has established a National Security Law Division in the Office of the General Counsel to ensure that all national security cases are legally sufficient and are handled in a consistent manner. The INS carefully scrutinizes the information and meets with representatives of the originating agency to examine the information.

If the INS believes the information is relevant and necessary in the case, the case is referred to the Department of Justice for intra-departmental review and discussion with other components. In order for the classified information to be used, this review process must result in the determination that the information is properly classified and either that the alien poses a risk to the national security, or that the classified information is otherwise material to issues in the case. In addition, the Attorney General or the Deputy Attorney General must thereafter approve use of the evidence.

Once this process is completed, the INS presents the information to the immigration judge *in camera* and *ex parte.* The immigration judge then determines how much weight he or she will give to the information. If the immigration judge grants the application for relief, the INS may seek further review before the Board of Immigration Appeals (BIA), and if the immigration judge denies the application, the alien may appeal to the BIA.

It is important to note that while the *ex parte, in camera* use of classified information has garnered much media attention, it is in fact quite rare. As noted at the outset, in any given year, nearly 300,000 cases are processed by the INS and decided by the Executive Office for Immigration Review. The INS has presented classified evidence in only 11 pending cases, four of them involving detained aliens.

H.R. 2121's Amendments to Judicial Review

The INS opposes the bill's amendment to the judicial review provisions of the Act because the legislation is written so broadly it creates room for two parallel tracks of review, at both the district court and court of appeals levels. This will create confusion in the federal court system if the same case is pending at both levels at one time. The INS prefers the current law contained in Section 242(a) of the Act, which provides for judicial review of claims arising from removal proceedings through a timely-filed petition for review in the court of appeals.

Conclusion

For all these reasons, the INS opposes HR 2121. The INS believes that if H.R. 2121 were enacted, one result would be that aliens who have been involved in terrorist activity or human rights abuses in other countries would likely be able to obtain immigration benefits, in the absence of derogatory information that is unclassified. Once an alien becomes a lawful permanent resident, it is only a matter of time before that individual becomes a United States citizen. H.R. 2121 will put the INS in a position of extending the privilege of United States citizenship to those who are undeserving because they are dangers to the national security.

Mr. Chairman, this concludes my statement, and I would be happy to answer the Committee's questions.